

1 Hon. Marsha Pechman
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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**

9 MARK HOFFMAN, on behalf of himself
10 and all others similarly situated,

11 Plaintiff,

12 v.

13 HEARING HELP EXPRESS, INC.,
14 TRIANGULAR MEDIA CORP.,
15 LEADCREATIONS.COM, LLC and
16 LEWIS LURIE,

17 Defendants.

18 CASE NO. 3:19-cv-05960-MJP

19 **DEFENDANT HEARING HELP**
20 **EXPRESS, INC.'S RESPONSE**
21 **AND SURREPLY TO**
22 **PLAINTIFF'S MOTION TO**
23 **EXTEND DEADLINE TO SUBMIT**
24 **EXPERT TESTIMONY ON**
25 **WHETHER DEFENDANT'S**
26 **DIALING SYSTEM IS AN ATDS**

27 **ORAL ARGUMENT REQUESTED**

28 DEFENDANT'S RESPONSE AND SURREPLY TO MOTION TO EXTEND DEADLINE TO SUBMIT EXPERT TESTIMONY ON ATDS No. 3:19-cv-05960-MJP

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I. INTRODUCTION

Defendant Hearing Help Express, Inc. (“Defendant” or “HHE”) files this Response and Surreply to Plaintiff Mark Hoffman’s (“Plaintiff” or “Hoffman”) *Motion to Extend Deadline to Submit Expert Testimony on Whether Defendant’s Dialing System is an ATDS* (the “Motion”) as well as his *Reply in Support of Plaintiff’s Motion to Extend Deadline to Submit Expert Testimony on Whether Defendant’s Dialing System is an ATDS* (the “Reply”). [Dkts. No. 107 and 110]. HHE requests that Plaintiff’s Motion be denied because if it is granted, the dispositive motion deadline will be after the deadline for expert reports on the automatic telephone dialing system (“ATDS”) – a central dispositive issue in the case.

As Plaintiff points out in his Reply, HHE did not file a formal Opposition to the Motion because the parties had agreed to a modified schedule that would accommodate Plaintiff's concerns in his Motion as well as continue the dispositive motion deadline so it fell after all expert reports are due. Therefore, and instead of HHE filing an Opposition, the parties filed their *Stipulated Motion to Amend Case Schedule* (the "Stipulated Motion") [Dkt. 108] on January 6, 2021. On January 7, 2021, the Court denied the Stipulated Motion because the dispositive motion deadline was not far enough in advance of the trial date. [Dkt. 109].¹ Now, Plaintiff requests the Court to simply grant the Motion in its entirety, which will make an unworkable deadline for all parties to the case, and prejudice HHE.

II. ARGUMENT

Hoffman filed the Motion requesting that the Court extend one deadline - the deadline for designation of experts and the submission of expert reports on the issue of whether HHE's Genesys platform qualifies as an ATDS under the Telephone Consumer Protection Act ("TCPA"). Hoffman's basis for this request is an appeal of a Ninth Circuit case pending before the U.S. Supreme Court on the definition/meaning of an ATDS that he believes will impact this

¹ The Court's recent Order acknowledged that Plaintiff had filed its Motion and HHE believes the Court has already addressed the Motion by Plaintiff by denying the Stipulated Motion, and also the relief requested in the Motion. [Dkt. 109].

1 case. *Duguid v. Facebook*, No. 19-51 (argued Dec. 8, 2020) (hereinafter “*Duguid*”).
 2 Specifically, Hoffman states “any decision that the Court issues [in *Duguid*] will very likely bear
 3 on the criteria that [his] expert will use to evaluate whether Hearing Help’s dialing system is an
 4 ATDS.” Mot. at 1. According to Plaintiff, a ruling on *Duguid* is expected in mid-2021.

5 The deadline at issue, and in the Court’s *Scheduling Order* [Dkt. No. 78], is January 15,
 6 2021, for “[r]eports from expert witness under FRCP26(a)(2).” Hoffman asks that this deadline
 7 be moved from this initial January 15, 2021, date to “August 6, 2021 or 30 days following the
 8 Supreme Court’s decision in *Duguid v. Facebook*, whichever is earlier.” Mot. at 4. This is the
 9 only deadline Plaintiff sought to modify in his Motion. This issue with Plaintiff’s proposed
 10 modified schedule in his Motion is that the dispositive motion deadline (currently May 27, 2021)
 11 will now be *before* expert discovery on the ATDS issue. This is highly prejudicial for all of the
 12 parties as expert reports and disclosures on this issue would be due *after* the deadline for parties
 13 to file dispositive motions. Therefore, the parties will not have the benefit of any expert reports
 14 prior to filing a dispositive motion on the ATDS issue.

15 HHE opposes the Motion in this Response and Surreply because it is nonsensical to have
 16 the dispositive motion deadline before expert reports are due on a central issue to this entire case.
 17 In fact, Plaintiff acknowledges that “[a]ny decision the Court issues will very likely bear on the
 18 criteria that Plaintiff’s expert will use to evaluate whether Hearing Help’s dialing system is an
 19 ATDS.” Mot. at 5. Expert testimony on this issue will be crucial for any dispositive motion and
 20 even more, the definition and meaning of ATDS could change after the current dispositive
 21 motion deadline pending the U.S. Supreme Court’s ruling in *Duguid*. Moreover, the decision in
 22 *Duguid* may be dispositive of an element of Hoffman’s only claim, or may warrant an early
 23 motion for summary judgment on the issue prior to wasteful class discovery and class
 24 certification briefing, or trial. This is why after the Court denied the Stipulated Motion of the
 25 parties [Dkt No. 109], HHE requested the parties agree to a schedule whereby the case is stayed
 26 for five months pending the ruling in *Duguid*. HHE recognizes that a stay request or trial
 27 continuance is not before the Court at this juncture. Therefore, it requests that Plaintiff’s Motion

1 be denied as the requested deadline would mean no parties have the opportunity to file a
2 dispositive motion on the ATDS issue because expert reports will be due after the deadline.

3 **III. CONCLUSION**

4 HHE respectfully requests that that the Motion be denied in its entirety.

5 DATED this 8th day of January, 2021.

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CERTIFICATE OF SERVICE

I, Nicole Metral, hereby certify that on January 8th, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following

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Signed at Los Angeles, California this 8th day of January 2021.

/s/ Nicole Metral
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DEFENDANT'S RESPONSE AND SURREPLY TO MOTION TO
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